OCT 15 2008

3

Nos. 08-40, 08-58 and 08-67

In the Supreme Court of the United States

JOSEPH HIRKO, PETITIONER

v.

UNITED STATES OF AMERICA

REX SHELBY, PETITIONER

v.

UNITED STATES OF AMERICA

F. SCOTT YEAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, under the collateral estoppel component of the Double Jeopardy Clause, the jury's verdict that petitioners were not guilty on some counts bars the government from retrying petitioners on other counts on which the jury was unable to reach a verdict.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Argument 11
Conclusion 24

TABLE OF AUTHORITIES

Cases:

Aguilar-Aranceta v. *United States*, 506 U.S. 834 (1992) 22
Arizona v. *Washington*, 434 U.S. 497 (1978) 17
Ashe v. *Swenson*, 397 U.S. 436 (1970) 11, 12, 13, 15
Ashley Transfer & Storage Co. v. *United States*, 490 U.S. 1035 (1989) 22
Bennett v. *United States*, 487 U.S. 1205 (1988) 22
Bonner v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) 21
Campbell v. *United States*, 488 U.S. 993 (1988) 22
Dowling v. *United States*, 493 U.S. 342 (1990) 12, 13, 20
Green v. *United States*, 355 U.S. 184 (1957) 16
Ohio v. *Johnson*, 467 U.S. 493 (1984) 12, 16
Quintero v. *United States*, 528 U.S. 963 (1999) 21
Richardson v. *United States*, 468 U.S. 317 (1984) 12, 16, 17
Schiro v. *Farley*, 510 U.S. 222 (1994) 12, 16
Standefer v. *United States*, 447 U.S. 10 (1980) 13, 16
United States v. *Aguilar-Aranceta*, 957 F.2d 18 (1st Cir.), cert. denied, 506 U.S. 834 (1992) 17

Cases—Continued: Page

United States v. *Bailin*, 977 F.2d 270 (7th Cir. 1992) 18
United States v. *Bennett*, 836 F.2d 1314 (11th Cir.), cert. denied, 487 U.S. 1205 (1988) 21
United States v. *Frazier*, 880 F.2d 878 (6th Cir. 1989), cert. denied, 493 U.S. 1083 (1990) 18
United States v. *Howe*, 538 F.3d 820 (8th Cir. 2008) 17
United States v. *Larkin*, 605 F.2d 1360 (5th Cir. 1979), modified on other grounds, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S. 939 (1980) 10, 20, 21
United States v. *Mespoulede*, 597 F.2d 329 (2d Cir. 1979) 19, 20
United States v. *Ohayon*, 483 F.3d 1281 (11th Cir. 2007) 20, 21
United States v. *Powell*, 469 U.S. 57 (1984) 11, 13, 14
United States v. *Quintero*, 165 F.3d 831 (11th Cir.), cert. denied, 528 U.S. 963 (1999) 21
United States v. *Romeo*, 114 F.3d 141 (9th Cir. 1997) ... 18
United States v. *White*, 936 F.2d 1326 (D.C. Cir.), cert. denied, 502 U.S. 942 (1991) 17
Wade v. *Hunter*, 336 U.S. 684 (1949) 17
White v. *United States*, 502 U.S. 942 (1991) 21

Constitution, statutes and regulation:

U.S. Const. Amend. V 3, 11
Double Jeopardy Clause 3, 5, 11, 12, 15, 16
Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* 18
15 U.S.C. 78j(b) (2000) 2, 3, 4
15 U.S.C. 78ff (2000 & Supp. II 2002) 2, 3, 4

Statutes and regulation—Continued: Page

18 U.S.C. 371 (2000) 2, 3
18 U.S.C. 1343 (Supp. II 2002) 2, 3
18 U.S.C. 1957 (2000) 3, 4
17 C.F.R. 240.10b-5 ..... 2, 3, 4

In the Supreme Court of the United States

No. 08-40

JOSEPH HIRKO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 08-58

REX SHELBY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 08-67

F. SCOTT YEAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 521 F.3d 367.[1] The opinion of the district

[1] Unless otherwise noted, all references to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 08-40.

court denying petitioner Hirko's motion to dismiss (Pet. App. 29a-59a) is reported at 447 F. Supp. 2d 734. The opinion of the district court denying petitioner Shelby's motion to dismiss (08-58 Pet. App. 29a-60a) is reported at 447 F. Supp. 2d 750. The opinion of the district court denying petitioner Yeager's motion to dismiss (08-67 Pet. App. 29a-66a) is reported at 446 F. Supp. 2d 719.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2008. A petition for rehearing was denied on April 14, 2008 (Pet. App. 60a-61a). The petition for a writ of certiorari in No. 08-40 was filed on July 8, 2008, and the petitions for a writ of certiorari in Nos. 08-58 and 08-67 were filed on July 14, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 2005, a grand jury sitting in the Southern District of Texas returned a seventh superseding indictment against petitioners Hirko and Shelby and an eighth superseding indictment against petitioner Yeager. Hirko was charged with conspiracy to commit wire fraud and securities fraud, in violation of 18 U.S.C. 371 (2000); securities fraud, in violation of 15 U.S.C. 78j(b) (2000), 15 U.S.C. 78ff (2000 & Supp. 2002), and 17 C.F.R. 240.10b-5; two counts of wire fraud, in violation of 18 U.S.C. 1343 (Supp. II 2002); and five counts of insider trading, in violation of 15 U.S.C. 78j(b) (2000), 15 U.S.C. 78ff (2000 & Supp. II 2002), and 17 C.F.R. 240.10b-5. Seventh Superseding Indictment paras. 23-29, 34-35. Shelby was charged with conspiracy to commit wire fraud and securities fraud, securities fraud, and four counts of insider trading. *Id.* paras. 23-27, 32-33. Yea-

ger was charged with five counts of insider trading and eight counts of money laundering in violation of 18 U.S.C. 1957 (2000). Eighth Superseding Indictment paras. 26-29. Petitioners moved to dismiss the bulk of those charges on the ground that the collateral estoppel component of the Fifth Amendment's Double Jeopardy Clause barred their prosecution. See Pet. App. 5a. The district court denied petitioners' motions. *Id.* at 29a-59a (Hirko); 08-58 Pet. App. 29a-60a (Shelby); 08-67 Pet. App. 29a-66a (Yeager). The court of appeals affirmed. Pet. App. 1a-28a.

1. Petitioners were executives at Enron Broadband Services (EBS), a unit of Enron Corporation engaged in the telecommunications business. In late 1998, EBS sought to develop an advanced "intelligent" communications network and the software necessary to run the network. According to the indictments, petitioners purposely sought to deceive the public and to drive up the price of Enron stock by making false statements about EBS's progress and financial condition. At the same time, the indictments allege, petitioners enriched themselves by selling millions of dollars of Enron stock. The indictments charge that petitioners made the false claims in press releases between 1999 and 2000 and at Enron's annual analyst conference in January 2000. Pet. App. 3a-4a; Gov't C.A. Br. 5-12.

2. In November 2004, a fifth superseding indictment charged petitioners with conspiracy to commit wire fraud and securities fraud, in violation of 18 U.S.C. 371 (2000) (Count 1); securities fraud, in violation of 15 U.S.C. 78j(b) (2000), 15 U.S.C. 78ff (2000 & Supp. II 2002), and 17 C.F.R. 240.10b-5 (Count 2); and four counts of wire fraud, in violation of 18 U.S.C. 1343 (Supp. II 2002) (Counts 3-6). In addition, each peti-

tioner was charged with insider trading under 15 U.S.C. 78j(b) (2000), 15 U.S.C. 78ff (2000 & Supp. II 2002), and 17 C.F.R. 240.10b-5: Hirko was charged with seven counts (Counts 23-26, 172-174), Shelby was charged with eight counts (Counts 47-54), and Yeager was charged with 20 counts (Counts 27-46). Each petitioner was also charged with money laundering under 18 U.S.C. 1957 (2000): Hirko was charged with 14 counts (Counts 55-66, 175-176), Shelby was charged with six counts (Counts 166-171), and Yeager was charged with 99 counts (Counts 67-165). Pet. App. 3a n.2; Gov't C.A. Br. 2-3.

After a trial in the United States District Court for the Southern District of Texas, the jury found petitioners not guilty on some counts but was unable to reach a verdict on the remaining counts. The jury found Hirko not guilty on two counts of insider trading (Counts 23-24) and 12 counts of money laundering (Counts 55-66). The jury found Shelby not guilty on four counts of insider trading (Counts 51-54). And the jury found Yeager not guilty on the conspiracy count (Count 1), the securities fraud count (Count 2), and the four counts of wire fraud (Counts 3-6). The jury was unable to reach a verdict on the other counts. The district court granted judgments of acquittal for Shelby on the four wire fraud counts (Counts 3-6) and on the six money laundering counts (Counts 166-171). The court declared a mistrial on the remaining counts. Pet. App. 4a; Gov't C.A. Br. 3-4.

3. Subsequently, in November 2005, the grand jury returned the seventh and eighth superseding indictments, which essentially deleted the counts on which petitioners were acquitted and re-alleged some, but not all, of the counts on which the jury had deadlocked. The first two counts of the seventh superseding indictment

charged Hirko and Shelby with conspiracy to commit wire and securities fraud as well as securities fraud, and those counts rested on essentially the same facts as Counts 1 and 2 of the fifth superseding indictment. The seventh superseding indictment also re-alleged against Hirko two of the wire fraud counts and five of the insider trading counts that had been charged in the fifth superseding indictment, and it charged Shelby with four insider trading counts that had been alleged in the fifth superseding indictment. Neither Hirko nor Shelby was charged with any money laundering counts. The eighth superseding indictment charged Yeager with five counts of insider trading and eight counts of money laundering, all of which had been alleged in the fifth superseding indictment. Pet. App. 4a-5a; Gov't C.A. Br. 4, 11-12.

4. Petitioners Hirko and Shelby moved to dismiss some of the counts charged in the seventh superseding indictment, and petitioner Yeager moved to dismiss all of the counts charged in the eighth superseding indictment. Petitioners claimed that the collateral estoppel component of the Double Jeopardy Clause barred further prosecution on those counts because, according to petitioners, facts essential to conviction on the counts had been resolved in their favor by the acquittals at the prior trial. The district court denied the motions. Pet. App. 4a-5a, 29a-59a; 08-58 Pet. App. 29a-60a; 08-67 Pet. App. 29a-66a.

a. Hirko moved to dismiss the securities fraud count, the two wire fraud counts, and two of the insider trading counts. Pet. App. 5a, 31a-34a.[2] He argued that the jury

---

[2] The two insider trading counts that Hirko moved to dismiss involved transactions that occurred in 2000. Hirko did not move to dismiss three other insider trading counts that involved transactions that

at the prior trial had necessarily found that he did not engage in the misrepresentations that formed the factual basis of those counts when it found him not guilty of the 12 money laundering and two other insider trading counts. *Id.* at 44a-45a; Gov't C.A. Br. 17.

The district court denied Hirko's motion. Pet. App. 29a-59a. The court concluded that the prior acquittals on the money laundering counts had no preclusive effect because, "[u]nder the circumstances of this case, the jury could have acquitted [Hirko] for any number of reasons," including that the funds that he allegedly laundered "were derived from the sale of stock that did not involve the proceeds of criminal activity." *Id.* at 45a. The court concluded that the prior acquittals on the insider trading counts likewise had no preclusive effect because the court could not determine "what particular issues the jury necessarily decided" when it found Hirko not guilty of those charges. *Id.* at 51a.

b. Shelby moved to dismiss the securities fraud count and the four insider trading counts. 08-58 Pet. App. 4a-5a, 31a-34a.[3] He argued that those counts were barred by collateral estoppel because the jury at the prior trial had necessarily decided that he did not act with the requisite intent to defraud when it found him not guilty on four other insider trading counts. *Id.* at 34a-35a, 43a.

The district court denied Shelby's motion. 08-58 Pet. App. 29a-60a. The court concluded that "the record contain[ed] no clear indication" that the jury's acquittals on

---

occurred in 2001. Hirko also did not move to dismiss the conspiracy count. Pet. App. 5a, 33a-34a.

[3] Like Hirko, Shelby did not move to dismiss the conspiracy count. 08-58 Pet. App. 4a-5a, 34a.

the insider trading counts at the prior trial were "based on a finding that [Shelby] lacked knowledge or an intent to defraud." *Id.* at 49a. "Rather," the court explained, "the jury could have found that the government failed to prove beyond a reasonable doubt that [Shelby] actually used material non-public information that he had in his possession at the time that he made [the] trades [involved in those counts], or that the government failed to establish that [he] employed or devised a scheme to defraud during that time period." *Ibid.* The court observed that the government's evidence that Shelby had acquired material, nonpublic information at the time he made the stock sales was stronger for the counts on which the jury had hung than for the counts on which it had found Shelby not guilty. *Id.* at 49-50a.

c. Yeager moved to dismiss the five insider trading counts and the eight money laundering counts. 08-67 Pet. App. 5a, 31a-36a. He argued that those counts were barred by collateral estoppel because the jury at the prior trial had necessarily found that he did not use material, nonpublic information in his sales of Enron stock when it found him not guilty on the conspiracy count, the securities fraud count, and the four wire fraud counts. *Id.* at 39a-40a, 49a-50a.

The district court denied Yeager's motion. 08-67 Pet. App. 29a-66a. The court concluded that the jury's not-guilty verdicts at the prior trial "necessarily determined that [Yeager] did not knowingly and wilfully participate or agree to participate in a scheme to defraud in connection with the alleged false statements or material omissions made at the analyst conference and press releases." *Id.* at 59a. The court stressed, however, that this determination did not "negate the government's evidence and contention that Yeager possessed and used

material nonpublic information at the time he made trades of Enron stock." *Ibid.* Because the government was not required to prove Yeager's participation in the scheme to defraud in order to establish his guilt on the insider trading counts, the court ruled that the prior acquittals did not collaterally estop the government from retrying Yeager on the insider trading and money laundering counts. *Id.* at 58a-59a, 62a.

5. The court of appeals affirmed. The court held that, on the facts of this case, the acquittals at the prior trial did not collaterally estop the government from retrying petitioners on any of the counts on which the jury was unable to reach a verdict. Pet. App. 1a-28a.

a. The court of appeals first concluded that Shelby failed to show that the jury, in finding him not guilty on four insider trading counts, had necessarily made a factual determination that would bar a retrial on the other four insider trading counts and the securities fraud count. Pet. App. 8a-13a. The court observed that the four insider trading acquittals at the prior trial involved sales of Enron stock during the summer of 2000, while the four insider trading counts on which the jury hung involved sales between January and March 2000. *Id.* at 8a. After an "extensive" examination of the record, *id.* at 9a, the court found that the acquittals could have been based on the jury's determination that Shelby "did not 'use' undisclosed, material information when he made the sales" during the summer of 2000 but instead made those sales because of discomfort with the stock market. *Ibid.* That determination, the court explained, would not bar a retrial on the insider trading counts involving sales between January and March, because it would not preclude a finding that Shelby made *those* trades because he possessed insider information. *Id.* at 9a-11a.

The court also concluded that the four insider trading acquittals did not bar a retrial on the securities fraud count because "'[u]sing' insider information in making trades is not an element of securities fraud." *Id.* at 12a.

b. The court concluded that Hirko likewise failed to show that the jury, in acquitting him on the 12 money laundering counts and two insider trading counts, necessarily made a factual determination that would bar a retrial on the securities fraud count, the two wire fraud counts and the other five insider trading counts. Pet. App. 15a-18a. The court rejected Hirko's argument that the jury must have found that he did not commit the latter offenses because they were the predicate offenses for the 12 money laundering counts on which the jury acquitted. *Ibid.* The court observed that the jury was instructed that it could find Hirko guilty of money laundering only if the government proved that he engaged in transactions with funds "derived from a specified unlawful activity," and the instructions defined "specified unlawful activity" as "wire fraud" and "fraud in the sale of securities" (including insider trading). *Id.* at 17a & n.17. The court concluded that, based on those instructions, the jury could have acquitted Hirko on the money laundering counts because it was unable to decide whether the government had proved that he had committed securities fraud, wire fraud, and insider trading. *Id.* at 17a-18a.

c. Finally, the court concluded that Yeager failed to show that the jury, in acquitting him on the conspiracy count, the securities fraud count, and the four wire fraud counts, necessarily made a factual determination that would bar a retrial on the five insider trading counts and eight money laundering counts. Pet. App. 18a-28a. Based on its review of the record, the court initially con-

cluded that "the jury could have acquitted Yeager of securities fraud for two reasons: (1) there were no material misrepresentations or omissions made at the [2000 annual analyst] conference; or (2) Yeager did not knowingly make misrepresentations or omissions because he believed the presentations were truthful." *Id.* at 21a. "Under either rationale," the court reasoned, "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public." *Ibid.* The court observed that, if one considered the acquittals in isolation, it would appear that the jury "made a finding that precludes the Government from now prosecuting him on insider trading and money laundering." *Id.* at 22a.

The court concluded, however, that its precedent required it also to consider the hung counts, along with the acquitted counts, in examining what the jury actually determined. Pet. App. 22a-24a (citing *United States* v. *Larkin*, 605 F.2d 1360, 1370 (5th Cir. 1979), modified on other grounds, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S. 939 (1980)). The court observed that, "if Yeager is correct that the jury found that he did not have insider information, then the jury, acting rationally, would have acquitted him of insider trading and money laundering." *Id.* at 24a. Because it did not, the jury's action produced a "discrepancy." *Ibid.* The court believed that there were at least four possible explanations for that discrepancy but that it was "impossible" to determine which was the actual explanation. *Id.* at 25a. For that reason, the court concluded that Yeager could not carry his burden to show what the jury necessarily determined and thus collateral estoppel did not bar a retrial. *Ibid.*

The court expressly rejected the government's argument, based on *United States* v. *Powell*, 469 U.S. 57 (1984), that collateral estoppel never applies when a jury has found a defendant not guilty on some counts but the jury has hung on other counts at the same trial. Pet. App. 25a-28a. The court agreed with decisions of other circuits that had rejected that argument. *Id.* at 26a-27a. The court stated, however, that it parted ways with those circuits to the extent that "they ignored the mistried counts after they determined that *Powell* did not apply." *Id.* at 27a.

ARGUMENT

Petitioners contend (08-40 Pet. 13-28; 08-58 Pet. 8-25; 08-67 Pet. 9-21) that collateral estoppel bars a retrial on the counts on which the jury was unable to reach a verdict at their first trial. They further contend (08-40 Pet. 16-23; 08-58 Pet. 12-16; 08-67 Pet. 12-17) that the circuits are in conflict on whether a court may consider the jury's failure to reach a verdict on one count in determining the basis for a jury's acquittal on another count. The court of appeals correctly concluded that collateral estoppel does not bar retrial of petitioners on the counts on which the jury hung at petitioners' first trial. Although there is tension among the decisions of the courts of appeals on the proper application of the doctrine of collateral estoppel in the context of a mixed verdict, this Court's review is not warranted in this case.

1. In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court held that the Double Jeopardy Clause of the Fifth Amendment "embodie[s]" the doctrine of collateral estoppel, or issue preclusion, which bars a prosecution that would require the relitigation of ultimate factual issues that were resolved against the government in an

earlier prosecution. *Id.* at 445; see *Schiro* v. *Farley*, 510 U.S. 222, 232 (1994). A jury's acquittal of a defendant on one charge precludes the government from proceeding against him on a second charge, however, only if the jury necessarily found a fact in the defendant's favor that is an essential element of the second charge (*i.e.*, a fact that the government must prove beyond a reasonable doubt). See *Ashe*, 397 U.S. at 443-445; *Dowling* v. *United States*, 493 U.S. 342, 347-348, 350-352 (1990). The defendant bears the burden of identifying the factual issue necessarily decided at the first trial that precludes a second trial. *Id.* at 350-351; see *Schiro*, 510 U.S. at 233.

a. In the government's view, the doctrine of collateral estoppel should never bar the government from retrying a defendant on a count on which a jury was unable to reach a verdict when the same jury acquitted him on another count. See Gov't C.A. Br. 21-32. There are two reasons for that conclusion.

First, this Court has held that a "retrial following a 'hung jury' does not violate the Double Jeopardy Clause." *Richardson* v. *United States*, 468 U.S. 317, 324 (1984). As the Court explained in *Richardson*, "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy," *id.* at 325, but "a mistrial following a hung jury is not an event that terminates the original jeopardy," *id.* at 326. It thus follows that, as this Court has observed in a slightly different context, "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984). In the mixed verdict con-

text, the government is forced to retry some charges only because they were not resolved by the jury when all the charges were pursued together. Accordingly, there is no reason to preclude the retrial.

Second, the rationale behind collateral estoppel does not apply when a jury renders a mixed verdict of acquittal on some counts and hangs on others at the same trial. That kind of mixed verdict has only two explanations, neither which supports application of collateral estoppel.

The jury may have found that the government failed to prove a fact that, although essential for conviction on the count on which the defendant was acquitted, was not essential for conviction on the count on which the jury deadlocked. Collateral estoppel would not be applicable in that context because an acquittal on one charge collaterally estops the government from prosecuting another charge only if the jury, in finding the defendant not guilty, necessarily decided some fact that the government must prove beyond a reasonable doubt in order to convict on the second charge. See *Ashe*, 397 U.S. at 443-445; *Dowling*, 493 U.S. at 347-348, 350-352.

Alternatively, the jury may have found that the government failed to prove a fact that was essential for conviction on both counts. Collateral estoppel would not be applicable in that circumstance because the jury's failure to acquit on the hung count would be inconsistent with its acquittal on the other count. This Court has recognized that "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful" when a jury's verdicts are inconsistent. *United States* v. *Powell*, 469 U.S. 57, 68 (1984); see *Standefer* v. *United States*, 447 U.S. 10, 23 n.17 (1980) (inconsistency in jury verdicts "is reason, in

itself, for not giving preclusive effect to the acquittals"). When a jury has reached inconsistent verdicts, a defendant has no right to argue that the verdict of acquittal was "the one the jury 'really meant.'" *Powell*, 469 U.S. at 68. The same is true when the jury inconsistently acquits on one count and hangs on another. In that case, the presumption of rationality that underlies the doctrine of collateral estoppel does not apply.

b. Although the court of appeals rejected the argument that the doctrine of collateral estoppel should never bar a retrial of a defendant on a hung count based on an acquittal on another count by the same jury, Pet. App. 25a-27a, the court correctly concluded that collateral estoppel did not bar a retrial on the hung counts in this case.[4]

Contrary to petitioners' claims (08-40 Pet. 14-15, 24-28; 08-58 Pet. 16-18, 23-25; 08-67 Pet. 13, 19-21), assuming that collateral estoppel can ever apply in this context, the court of appeals was correct to consider the counts on which the jury deadlocked as well as the counts on which the jury acquitted in ascertaining what facts the jury necessarily found in petitioners' favor.[5] As

---

[4] Petitioners Hirko (08-40 Pet. 22-23) and Yeager (08-67 Pet. 19) contend that the analysis adopted by the court of appeals will in practice produce the same result as a categorical rule that collateral estoppel never applies in mixed verdict cases. That may be true. Nevertheless, the court of appeals expressly rejected a categorical rule and left open the possibility that collateral estoppel may apply in mixed verdict cases. Accordingly, it would be premature to conclude that the Fifth Circuit has adopted a categorical rule barring the application of collateral estoppel.

[5] The court of appeals explicitly applied that analysis only to petitioner Yeager's collateral estoppel claim. Pet. App. 22a-25a. The government agrees with petitioner Hirko (08-40 Pet. 2, 11, 14-15) that the

this Court explained in *Ashe*, to determine whether a defendant's prosecution is barred by the collateral estoppel component of the Double Jeopardy Clause, a court must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444 (citation omitted). The court's "inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ibid.* (internal quotation marks and citation omitted). A jury's failure to reach a verdict on certain counts, while acquitting the defendant on other counts, is among the "relevant matter" that a court may con-

---

court's decision is most reasonably read to apply the same analysis to his collateral estoppel claim.

Contrary to petitioner Shelby's contention (08-58 Pet. 16-18), the court of appeals did not apply the same analysis in rejecting his collateral estoppel claim. Rather, the court held that Shelby failed to show that the jury, in finding him not guilty on four insider trading counts, necessarily made a factual determination in his favor that would bar a retrial on the other four insider trading counts and the securities fraud count. See Pet. App. 8a-14a. After an "extensive examination of the record," the court concluded that the acquittals were based on a finding of fact on an element that the government was not required to prove with respect to the hung counts, *i.e.*, that Shelby did not use insider information when he sold Enron stock in the summer of 2000. *Id.* at 9a-12a. Thus, Shelby's collateral estoppel claim amounts to a fact-bound dispute about whether the court of appeals properly read the record in this case. See 08-58 Pet. 23-25. That claim does not warrant this Court's review.

sider in determining what facts the jury necessarily found in the defendant's favor.[6]

There is no merit in petitioners Hirko and Shelby's claim that consideration of hung counts "turn[s] the protective function of the Double Jeopardy Clause on its head" by encouraging prosecutors to "overcharge" a case. 08-40 Pet. 26; see 08-58 Pet. 18-20. As this Court explained in *Schiro*, the Double Jeopardy Clause's protections against a second prosecution following an acquittal or conviction "stem from the underlying premise that a defendant should not be twice tried or punished for the same offense." 510 U.S. at 229. The Double Jeopardy Clause is thus not designed to limit the number of charges that prosecutors bring. Instead, its primary purpose is to "guard[] against * * * successive prosecutions." *Id.* at 230; see *Johnson*, 467 U.S. at 498-499. A retrial on a hung count is not a "successive" prosecution because, unlike a verdict of conviction or acquittal, "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which [a defendant] was subjected." *Richardson*, 468 U.S. at 326; see *Green* v. *United States*,

---

[6] Petitioner Shelby (08-58 Pet. 15) erroneously contends that the court of appeals' consideration of the hung counts conflicts with this Court's decision in *Schiro*, a capital case in which the defendant argued that the jury's failure to return a verdict on one count had collateral estoppel effect at the sentencing hearing. 510 U.S. at 232-236. In *Schiro*, the jury returned a verdict finding the defendant guilty on one out of three counts of murder, *id.* at 225-226, but the jury was not instructed to return verdicts on all of the counts. *Id.* at 233. "[S]ince it was not clear to the jury that it needed to consider each count independently," the Court declined to "draw any particular conclusion from its failure to return a verdict on Count I." *Id.* at 234. *Schiro* thus does not address the relevance to collateral estoppel analysis of a jury's inability to reach a verdict on a count that it was required to consider.

355 U.S. 184, 187-188 (1957). Indeed, giving collateral estoppel effect to a jury's acquittal on one count to bar a retrial on a hung count would undermine "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Richardson*, 468 U.S. at 324 (quoting *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978)); see *Wade* v. *Hunter*, 336 U.S. 684, 688-689 (1949).

The Fifth Circuit's analysis in this case is similar to the approaches taken by the First, Eighth, and District of Columbia Circuits. See *United States* v. *Howe*, 538 F.3d 820, 827-829 (8th Cir. 2008); *United States* v. *Aguilar-Aranceta*, 957 F.2d 18, 24-25 (1st Cir.), cert. denied, 506 U.S. 834 (1992); *United States* v. *White*, 936 F.2d 1326, 1328-1329 (D.C. Cir.), cert. denied, 502 U.S. 942 (1991). In each of those cases, the defendant was charged with multiple counts that involved a common issue. The jury acquitted the defendant on one count and deadlocked on another count. The court of appeals, taking into account both the jury's verdict of acquittal on one count and the jury's failure to reach a verdict on the other count, declined to hold that the verdict of acquittal rested on a finding in the defendant's favor on the common issue. The court instead reasoned that the verdict of acquittal could more rationally be explained as resting on the jury's finding on an issue that was not common to both counts. *Howe*, 538 F.3d at 828-829; *Aguilar-Aranceta*, 957 F.2d at 24-25; *White*, 936 F.2d at 1329. The court below followed essentially the same approach here.

2. Petitioners contend (08-40 Pet. 16-19, 22-23; 08-58 Pet. 12-16; 08-67 Pet. 12-17) that the decision below conflicts with decisions of the Sixth, Seventh, Ninth and Eleventh Circuits. Although there is tension between

the decisions of those circuits and the decision of the court of appeals in this case, this Court's review is not warranted at this time.

In *United States* v. *Frazier*, 880 F.2d 878, 885-886 (1989), cert. denied, 493 U.S. 1083 (1990), the Sixth Circuit applied collateral estoppel to bar retrial on a hung count based on a simultaneous acquittal on another count. The court rejected the government's argument that a jury's simultaneous acquittal and failure to reach a verdict amounted to the kind of inconsistency that would trigger the *Powell* rule that no factual finding in the defendant's favor can be deduced from inconsistent verdicts. *Id.* at 882-883.

In *United States* v. *Bailin*, 977 F.2d 270 (1992), the Seventh Circuit reached a similar result in a slightly different context. In that case, the jury was unable to reach a verdict on counts charging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, but it acquitted the defendant on other counts charging offenses that were also among the predicate acts in the RICO counts. The Seventh Circuit held that, although the government could retry the defendant on the RICO counts, the government could not base the RICO counts on predicate acts of which the defendant had been acquitted. *Bailin*, 977 F.2d at 275-283. In so holding, the court declined to apply the *Powell* rule, finding that "the jury's failure to reach a verdict [was] too inconclusive to qualify as inconsistent [with the acquittals] for the purposes of issue preclusion." *Id.* at 280 (internal quotation marks and citation omitted).

In *United States* v. *Romeo*, 114 F.3d 141 (1997), the Ninth Circuit held that the defendant's acquittal on a drug possession count barred his retrial on a drug im-

portation count on which the jury failed to reach a verdict. The court concluded that "a rational jury could [not] have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," *i.e.*, that the defendant did not know that marijuana was in the trunk of the car that he drove from Mexico to the United States. *Id.* at 143 (citation omitted). The court declined to apply the *Powell* rule, observing that "[t]he inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not on why the jury could not agree on the deadlocked count." *Id.* at 144.

There is tension between the decisions in *Frazier*, *Bailin*, and *Romeo* and the court of appeals' decision in this case, but there is no conflict. None of those decisions holds that a jury's failure to reach a verdict on one count is *always* irrelevant in determining what facts the jury necessarily found in acquitting the defendant on another count. Rather, those decisions merely found that, on the particular facts of those cases, the defendants had made out their collateral estoppel claims. Moreover, the court of appeals in this case made clear that it was *not* holding that the doctrine of collateral estoppel could *never* be applied to bar a retrial in the mixed verdict context. Pet. App. 25a-28a.[7]

---

[7] Petitioners Hirko (08-40 Pet. 23) and Yeager (08-67 Pet. 13) also rely on *United States* v. *Mespoulede*, 597 F.2d 329 (2d Cir. 1979). That case is inapposite, however, because it involved the application of collateral estoppel to bar the admission of evidence at a retrial, rather than to bar the retrial itself. Moreover, *Mespoulede* has been effectively overruled by this Court's decision in *Dowling*, which held that collateral estoppel does not bar the admission of evidence of a fact resolved in a defendant's favor at the first trial, provided that the government is not seeking to prove that fact beyond a reasonable doubt at the second trial.

More recently, the Eleventh Circuit held in *United States* v. *Ohayon*, 483 F.3d 1281, 1288-1291 (2008), that a jury's failure to reach a verdict on a hung count is not relevant to the determination whether the defendant has made out a collateral estoppel claim based on an acquittal on another count. The court held that the jury's acquittal on a charge of attempt to possess ecstasy with the intent to distribute it collaterally estopped the government from retrying the defendant on a charge of drug conspiracy, because the jury necessarily found that the defendant did not know that drugs were in the bag he received from a confidential informant. *Id.* at 1286-1287. In rejecting the government's argument that the partial mixed verdict showed that jury did not acquit on that basis, the court stated that "[a] partial verdict does not comprise two decisions that we must try to reconcile, because the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis." *Id.* at 1289.

Although *Ohayon* appears to conflict with the decision in this case, this Court's review to resolve that apparent conflict would be premature at this time. It is possible that the Eleventh Circuit might reconsider its decision in *Ohayon* in light of the decision in this case. In *Ohayon*, the Eleventh Circuit declined to follow circuit precedent that is consistent with the decision in this case because the court concluded that the precedent was inconsistent with an earlier precedent, *United States* v. *Larkin*, 605 F.3d 1360 (5th Cir. 1979), modified on other grounds, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S.

Compare *Dowling*, 493 U.S. at 347-350, with *Mespoulede*, 597 F.2d at 334-335.

939 (1980).[8] See *Ohayon*, 483 F.3d at 1288-1289 (declining to follow *United States* v. *Quintero*, 165 F.3d 831 (11th Cir.), cert. denied, 528 U.S. 963 (1999), and *United States* v. *Bennett*, 836 F.2d 1314 (11th Cir.), cert. denied, 487 U.S. 1205 (1988)). But the Fifth Circuit's decision in this case makes clear that the Eleventh Circuit misread *Larkin*. As the court below explained, *Larkin* actually requires that a hung count be taken into account in determining the collateral estoppel effect of an acquittal. Pet. App. 23a-24a; see *Larkin*, 605 F.2d at 1370 ("No rational jury could have absolved Larkin of liability for Parker's crimes [on the vicarious liability counts] because of the absence of a conspiracy between the two, while it simultaneously failed to acquit Larkin on the conspiracy charge itself."). Accordingly, the Eleventh Circuit may be willing to re-examine its decision in *Ohayon* in an appropriate future case.[9]

3. a. This Court's review is also unwarranted at this time because the question presented arises relatively infrequently. We are aware of only two occasions other than this one in the last 20 years in which this Court has been asked to resolve the tension among the courts of appeals on the issue. The Court denied review in both of those cases. See *Quintero* v. *United States*, 528 U.S. 963 (1999) (No. 99-39); *White* v. *United States*, 502 U.S. 942

---

[8] In *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (1981) (en banc), the Eleventh Circuit adopted as binding precedent decisions of the former Fifth Circuit rendered before October 1, 1981.

[9] As petitioner Hirko notes (08-40 Pet. 23-24), the government filed a petition for rehearing en banc in *Ohayon*. The Eleventh Circuit's issuance of its decision on April 12, 2007, and denial of the government's petition on August 7, 2007, occurred before the court of appeals decided this case on March 17, 2008.

(1991) (No. 91-516). The Court should do the same here.[10]

b. Indeed, review would be particularly inappropriate in this case because collateral estoppel would not bar petitioners' retrials even if petitioners were correct that the hung counts could not be considered. Even if only the acquittals are considered, none of the petitioners can show that the jury necessarily found a fact in his favor that is an essential element of the counts on which the jury deadlocked.

Contrary to petitioner Hirko's claim (08-40 Pet. 4-7), he cannot show that the jury's acquittals on the 12 money laundering counts necessarily rested on a finding that he did not commit the predicate acts alleged in the securities fraud count, two wire fraud counts, and two insider trading counts on which the jury deadlocked. As the government argued in the court of appeals, the indictment and jury instructions could rationally have led the jury to believe that it had to convict Hirko on *all* of the predicate securities, wire fraud, and insider trading counts in order to convict him on the money laundering counts. The indictment and the jury instructions both defined "specified unlawful activity" for purposes of the money laundering charges as "wire fraud * * * *and* fraud in the sale of securities." Fifth Superseding Indictment para. 52; Pet. App. 17a n.17 (emphasis added). And neither the court nor the parties ever

---

[10] The issue has also arisen in a few other cases in which the petitioner did not raise a conflict claim. See, *e.g.*, *Aguilar-Aranceta* v. *United States*, 506 U.S. 834 (1992) (No. 91-7995); *Ashley Transfer & Storage Co.* v. *United States*, 490 U.S. 1035 (1989) (No. 88-1305); *Campbell* v. *United States*, 488 U.S. 993 (1988) (No. 88-479); *Bennett* v. *United States*, 487 U.S. 1205 (1988) (No. 87-1751). The Court denied review in those cases as well.

expressly explained to the jury that the funds that Hirko was alleged to have laundered need not be derived from *both* of those offenses. Accordingly, the jury may have felt compelled to acquit Hirko on the money laundering counts once it decided to acquit him on two of the predicate insider trading counts that generated some of the funds that he allegedly laundered. See Gov't C.A. Br. 44-50.

Similarly, Shelby cannot show that the jury, in acquitting him on four insider trading counts, necessarily made a factual determination that would bar a retrial on the other four insider trading counts and the securities fraud count. See Pet. App. 7a-14a; Gov't C.A. Br. 38-43. Indeed, as discussed above, the court of appeals held that a retrial on the hung counts was not barred because the jury's acquittals were based on a finding of fact on an element that the government was not required to prove to establish Shelby's guilt on the hung counts, *i.e.*, that Shelby did not use insider information when he sold Enron stock in the summer of 2000. Pet. App. 9a-12a; see note 6, *supra*.

Finally, Yeager cannot show that the jury, in acquitting him on the conspiracy count, the securities fraud count, and the four wire fraud counts, necessarily made a factual determination that would bar his retrial on the five insider trading counts and eight money laundering counts. Although the court of appeals believed that "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information," Pet. App. 21a, the record does not support that conclusion. Instead, as the government argued in the court of appeals, the jury's acquittals on the conspiracy and fraud counts could have rested on the conclusion that Yeager did not participate in the failure to disclose the

true state of EBS's business or that he lacked the requisite intent to defraud when those misrepresentations or omissions occurred. Those conclusions would not preclude a finding that Yeager possessed insider information and used it to trade in Enron stock. See Gov't C.A. Br. 32-38. Indeed, as the district court found, Yeager "did not deny proof of his possession of material, nonpublic information." 08-67 Pet. App. 58a. Thus, the jury's acquittals do not bar a retrial on the five insider trading counts and eight money laundering counts on which the jury deadlocked.

Because petitioners cannot show that the jury necessarily found facts in their favor that would bar a retrial on the hung counts even if only the acquittals are considered, petitioners' claims involve only fact-bound applications of the doctrine of collateral estoppel. Further review of those claims by this Court is not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

OCTOBER 2008